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his "butchering business" about $1,000, and he had to his credit in bank, in the name of "R. Castelberg's Sons," about $4,000, but it was his individual money. There was evidence tending to show that the account was opened in connection with and for the convenience of the business, but there was also evidence showing that the account was resorted to in connection with the general business of the testator; that accounts were paid out of it in no wise connected with his business as butcher, and that it was not at all necessary for the conduct of that business.

Held: The $4,000 does not pass to the sons as a chose in action used in the "butchering business" of the testator, but to all of his children, who appear to have been equally the objects of his bounty. The rule that equality is equity is not without force in a case of doubtful construction.

MONTGOMERY v. COMMONWEALTH.—Decided at Wytheville, June 14, 1900.—*Harrison*, J:

1. CRIMINAL LAW—*Defence of person or property—Trespass.* A man may rightfully use as much force as is necessary for the protection of his person or property, provided he does not endanger human life or do great bodily harm. But, for a mere trespass upon land, the owner has no right to assault the trespasser with a deadly weapon, the result of which may be to kill him, or do him great bodily harm. Life may be taken to save life or limb, or to prevent a great crime, or to accomplish a necessary public duty, but not because the slayer cannot otherwise effect his object, even though that object be right.

2. CRIMINAL LAW—*Indictment—Conviction of lesser offense.* On an indictment for malicious cutting and wounding with intent to maim, disfigure, disable and kill, the defendant may be convicted of unlawful cutting and wounding with like intent, or of assault and battery.

PAYNE v. ZELL.—Decided at Wytheville, June 14, 1900. *Riely*, J:

1. CONTINUANCE—*Discretion.* A motion for a continuance is addressed to the sound discretion of the trial court, and, while its action is subject to review, it will not be reversed unless plainly erroneous.

2. NOTICE TO TAKE DEPOSITIONS—*Non-residents.* While notice to take depositions may be served on the counsel for a non-resident party, the time prescribed by sec. 3363 of the Code between date of service and taking deposition must elapse or the deposition cannot be read, if objected.

3. NEGOTIABLE PAPER—*Value—Pre-existing debt—Collateral—Case at bar.* A pre-existing debt constitutes value for the transfer of negotiable paper. If the transfer be made merely as collateral, the transferee is a holder for value to the extent of the amount due him. In the case at bar the note is complete and regular on its face, the plaintiff acquired it in good faith for value before maturity, and without notice of any infirmity attaching to it.

SOUTHERN RAILWAY CO. v. COOPER.—Decided at Wytheville, June 14, 1900.—*Cardwell*, J:

1. DEMURRER TO EVIDENCE—*Motion to exclude or strike out evidence.* The only mode of taking away from the jury the determination of the weight to be given

to evidence is by demurring. A motion to exclude or strike out applies only to irrelevant or inadmissible evidence.

2. RAILROADS—*Crossing—Whistle.* Where a statute imposes upon a railroad company the duty of sounding the whistle on its locomotive engines approaching a crossing of a highway for the purpose of preventing a collision with travellers on the highway or frightening their teams, and the company fails to perform that duty, it is negligence, for the consequences of which the company is liable.

3. RAILROADS—*Frightened horses—Necessary noise—Whistle.* A railroad company is not liable for injuries received from horses becoming frightened upon a highway at the mere sight of its trains or the noises necessarily incident to the running of the train and the operation of the road. Nor is it liable for failure to sound its whistle at a point where it is forbidden to do so either by statute or ordinance of a municipal corporation.

4. RAILROADS—*Signals—Bells—Judicial notice—Frightened horses.* Bells are used on locomotives to lessen the danger to travellers on a street or highway of a collision with an engine crossing the same, and courts will take judicial notice of this fact, but they are not intended or useful in warning persons to keep at such distance from the track of the company as will prevent their horses from becoming frightened at a passing engine.

CROCKETT v. GRAYSON.—Decided at Wytheville, June 21, 1900.—*Keith*, P. Absent, *Riely*, J:

1. REAL ESTATE BROKERS—*Completed sale—Commissions—Case at bar—False representations of vendor—Injury.* A real estate broker to be entitled to compensation must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commission. When he has found such a purchaser who has entered into a valid contract his right to compensation cannot be defeated by the fault of the seller, by his misrepresentations, or by his whimsical or unreasonable refusal to comply with his contract. In the case at bar, however, the contract secured by the broker reserved to the purchaser the liberty to declare the contract null and void if the liens on the land exceeded a specific sum which was represented by the vendor to be all. They exceeded that sum and he declared the contract void. There was no completed contract, therefore, and the broker is not entitled to his commission. If the representation of the vendor be treated as false, the broker was not injured, as it appears that the purchaser would not have entered into the contract but for the representation.

BLANKENSHIP AND OTHERS v. ELY.—Decided at Wytheville, June 21, 1900.—*Harrison*, J. Absent, *Riely*, J:

1. BONDS—*Order requiring execution—Recitals—Estoppel.* A bond executed pursuant to an order made in a chancery suit requiring its execution as a condition precedent to the enjoyment of certain rights, does not derive its efficacy from the order, and the liability of the obligors is determined by the bond alone and not by the order. The obligors are estopped to deny the recitals of the bond, even if they were in conflict with record, and a plea of *nul tiel record* is inapplicable.